

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SHAVONDA HAWKINS, on behalf
of herself and all others similarly
situated,

Plaintiff,

v.

THE KROGER COMPANY,

Defendant.

Case No.: 15cv2320 JM (AHG)

**ORDER ON CROSS MOTIONS FOR
SUMMARY JUDGMENT**

Plaintiff Shavonda Hawkins and Defendant The Kroger Company (“Kroger”) move for summary judgment or partial summary judgment. (Doc. Nos. 275, 286.) The motions have been fully briefed and the court finds them suitable for submission without oral argument in accordance with Civil Local Rule 7.1(d)(1). For the below reasons, the motions are **DENIED IN PART** and **GRANTED IN PART**.

I. BACKGROUND

The parties do not dispute that Plaintiff purchased Kroger breadcrumbs in San Diego about six times per year from 2000 to July of 2015. She purchased the breadcrumbs for use in her weekly family meatloaf. Beginning in 2008, the front label of the breadcrumbs read “0g Trans Fat Per Serving.” (*See* Doc. No. 275-1 at 281-87.) On the back of the

1 breadcrumbs, in the nutrition fact panel (“the nutrition label”), the label read “Trans Fat
2 0g” and included partially hydrogenated vegetable oil (“PHO”) as an ingredient. (*Id.*)
3 Because the breadcrumbs contained PHO, they contained “trace amounts” of trans fat.
4 (Doc. No. 104 at 9.)

5 On October 15, 2015, Plaintiff filed a class action alleging violation of California’s
6 False Advertising Law (“the FAL”), CAL. BUS. & PROF. CODE §§ 17500-501, Unfair
7 Competition Law (“the UCL”), *id.* § 17200, and the Consumers Legal Remedies Act (“the
8 CLRA”), CAL. CIV. CODE §§ 1750-1785. She also brought claims for breach of the implied
9 warranty of merchantability and breach of express warranty. On March 17, 2016, the court
10 granted Kroger’s first motion to dismiss, with prejudice, under Rule 12(b)(6). (Doc. No.
11 19.) The court found Plaintiff lacked statutory standing to bring claims under the UCL,
12 FAC, and CLRA, and alternatively, that her labeling claims were preempted by federal
13 law. (*Id.*) On November 16, 2018, the Ninth Circuit reversed and remanded the case. On
14 November 8, 2019, Kroger filed a second motion to dismiss under Rule 12(b)(6), (Doc.
15 No. 34), which the court denied on April 4, 2019, (Doc. No. 40). On January 21, 2020,
16 Plaintiff filed a motion for class certification. (Doc. No. 89-1.) On November 9, 2020, the
17 court certified the following class:

18 All citizens of California who purchased, between January 1, 2010 and
19 December 31, 2015, Kroger Bread Crumb containing partially hydrogenated
20 oil and the front label claim “0g Trans Fat.”

21 (Doc. No. 263 at 38.)

22 **II. LEGAL STANDARDS**

23 “The court shall grant summary judgment if the movant shows that there is no
24 genuine issue as to any material fact and that the movant is entitled to judgment as a matter
25 of law.” Fed. R. Civ. P. 56(a). The moving party bears the initial burden of informing the
26 court of the basis for its motion and identifying those portions of the record demonstrating
27 the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323
28 (1986). Once the moving party has done so, the nonmoving party must “go beyond the

pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial.” *Celotex*, 477 U.S. at 324 (internal quotation and citation omitted). The court must examine the evidence in the light most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The court may not weigh evidence or make credibility determinations. *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986). Any doubt as to the existence of any issue of material fact requires denial of the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). “A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties’ differing versions of the truth.” *SEC v. Seaboard*, 677 F.2d 1301, 1306 (9th Cir. 1982). Summary judgment can only be entered “if, under the governing law, there can be but one reasonable conclusion as to the verdict.” *Anderson*, 477 U.S. at 250. The trial court’s inquiry is not whether a reasonable trier of fact is likely to find in favor of the opposing party, but whether it could do so. *McIndoe v. Huntington Ingalls*, 817 F.3d 1170, 1176 (9th Cir. 2016).

III. DISCUSSION

Plaintiff’s claims are based on the *use* of PHO (Plaintiff’s “use claims”), as well as the front *label* reading “0g Trans Fat” (Plaintiff’s “labeling claims”). Plaintiff claims the use of PHO in Kroger breadcrumbs during the class period violated the unlawful and unfair prongs of the UCL (Counts I and II). Plaintiff further claims the “0g Trans Fat” label on the front of the breadcrumbs violated the unlawful, unfair, and fraudulent prongs of the UCL (Counts IV-VI), as well as the FAL and CLRA (Counts VII and VIII). Plaintiff also brings claims for breach of implied and express warranties (Counts III and IX).

A. Use Claims Under the UCL

1. Unlawful Prong

Kroger argues that Plaintiff’s claim that use of PHO violated the unlawful prong of the UCL (Count II) fails because the use of PHO in food products was legal during the class period, i.e. from 2010 through 2015. (Doc. No. 275 at 20-24.) Plaintiff claims that by using PHO in food products, Kroger violated the Federal Food, Drug, and Cosmetic Act

1 (“the FDCA”), 21 U.S.C. §§ 348, 342, as well as the California Sherman Food, Drug, and
 2 Cosmetic Law (“the Sherman Law”), CAL. HEALTH & SAFETY CODE § 110100. (Compl.
 3 ¶¶ 132-33.)

4 Plaintiff does not claim Kroger used PHO in its breadcrumbs at any point after June
 5 18, 2018. Courts consistently agree that use of PHO prior to June 18, 2018 did not violate
 6 the FDCA. For example, in *Hawkins v. Advancepierre Foods, Inc.*, Case No. 15-cv-2309-
 7 JAH (BLM), 2016 WL 6611099, at *4-5 (S.D. Cal. Nov. 8, 2016), *aff’d*, 733 F. App’x 906
 8 (9th Cir. 2018), the district court found the defendant’s use of PHO prior to June 18, 2018
 9 did not plausibly violate the FDCA. The court explained, as others have, that in 2015 the
 10 FDA determined there is no longer a consensus that PHOs are generally recognized as safe,
 11 and set June 18, 2018 as the date by which PHO must be removed from food products.¹ *Id.*
 12 at *3. The district court also dismissed Plaintiff’s Sherman Law claim because it was
 13 preempted by federal law. *Id.* at *6. On appeal, the Ninth Circuit did not address the
 14 preemption issue, but held that “federal law did not prohibit PHOs prior to June 18, 2018”
 15 and that “use of PHOs did not violate this provision [of the Sherman Act adopting federal
 16 law] because it did not violate federal law.” 733 F. App’x at 907. Multiple other district
 17 courts have found it not plausible that use of PHO in foods prior to June 18, 2018
 18 constitutes a violation of the FDCA or Sherman Law. *See, e.g., Backus v. Biscoimerica*
 19 *Corp.*, Case No. 16-cv-03916-HSG, 2017 WL 1133406, at *3-4 (N.D. Cal. Mar. 27, 2017);
 20 *Hawkins v. Kellogg Co.*, 224 F. Supp. 3d 1002, 1012 (S.D. Cal. 2016); *Backus v. Conagra*
 21 *Foods, Inc.*, No. C 16-00454 WHA, 2016 WL 3844331, at *4 (N.D. Cal. July 15, 2016);
 22 *Backus v. Gen. Mills, Inc.*, 122 F. Supp. 3d 909, 927 (N.D. Cal. 2015) (federal law only).

23 Plaintiff makes no attempt to distinguish the claims or arguments made by her or her
 24 counsel in the above cases from those made here, except to claim, in passing, that this court
 25 previously “rejected Kroger’s arguments for preemption of state law.” (Doc. No. 287 at
 26

27
 28 ¹ The June 18, 2018 deadline was subsequently extended to June 18, 2020. (Doc. No. 40
 at 5 (citing 83 Fed. Reg. 23358, 23359 (May 21, 2018)).

26.) Plaintiff is correct that this court, in denying a motion to dismiss, concluded “the statement ‘0g Trans Fat,’ made outside the nutrition label, is not preempted because it does not impermissibly conflict with federal law.” (Doc. No. 40 at 7.) As the court made clear, however, this conclusion was made with respect to Plaintiff’s claims regarding the “0 Trans Fat” *label*, not those related to the *use* of PHO. *See id.* (“[P]ermitting the use of PHO in products until 2020 is separate and distinct from the alleged packaging misrepresentation of ‘0g Trans Fat.’”). Additionally, Plaintiff does not dispute Kroger’s contention that her state law claims are premised on federal law because “the Sherman Law simply adopts the very FDA regulations that permit the use of PHO.” (Doc. No. 275 at 24.)

The only other argument put forth by Plaintiff in defense of her use claim under the unlawful prong is that Kroger failed to raise collateral estoppel as an affirmative defense in its Answer. (Doc. No. 287 at 20.) Irrespective of whether Kroger waived a collateral estoppel defense, *Advancepierre* and multiple other cases involving use of PHO claims are on-point and persuasive.² Accordingly, Kroger’s motion for summary judgment as to Plaintiff’s use claim under the unlawful prong of the UCL (Count II) is **GRANTED**. In Plaintiff’s motion for summary judgment as to the same claim, she merely repeats the same legal arguments she made in opposition to Kroger’s motion. (*See* Doc. No. 286 at 14-18.) Accordingly, Plaintiff’s motion for summary judgment as to her use claim under the unlawful prong is **DENIED**.

2. Unfair Prong

Kroger argues that Plaintiff’s use claim under the unfair prong of the UCL (Count I) fails because it overlaps entirely with her claim under the unlawful prong. (Doc. No. 275 at 24-25.) Plaintiff argues it is unfair that Kroger used PHO in its breadcrumbs because, as demonstrated by Dr. Wong’s Report and peer-reviewed medical journal studies, PHO is

² The Ninth Circuit also recently found a plaintiff failed to show constitutional standing in a use claim under the UCL by alleging injuries based on the mere consumption of trans fat. *McGee v. S-L Snacks Nat’l*, No. 17-55577, 2020 WL 7087008, at *4 (9th Cir. Dec. 4, 2020). The plaintiff in *McGee* did not, however, bring claims related to labeling. *See id.* at n.5.

1 harmful to consumers. (Doc. No. 287 at 26.) Kroger responds that Plaintiff fails to explain
 2 how the use of PHO meets any of the tests under California law for unfair conduct under
 3 the UCL, and that Dr. Wong's report is unreliable and inadmissible. (Doc. No. 309 at 10.)

4 As recognized by the Ninth Circuit, "[t]he UCL does not define the term 'unfair.'
 5 In fact, the proper definition of 'unfair' conduct against consumers 'is currently in flux'
 6 among California courts.'" *Hodsdon v. Mars, Inc.*, 891 F.3d 857, 866 (9th Cir. 2018)
 7 (quoting *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1169 (9th Cir. 2012)). Some
 8 California courts have found that unfair conduct occurs if it "offends an established public
 9 policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially
 10 injurious to consumers." *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App.
 11 4th 861, 886-87 (1999); *Hodsdon*, 891 F.3d at 866. Other courts have found that unfair
 12 conduct must be "tethered to some legislatively declared policy or proof of some actual or
 13 threatened impact on competition." *Davis*, 691 F.3d at 1169-70 (internal citations
 14 omitted).³

15 On the one hand, and as discussed above, during the class period there was no public
 16 policy against Kroger's use of PHO because it was lawful to do so. Given that use of PHO
 17 was legal during the class period, and the FDA declined to prohibit its use during the class
 18 period, it is not clear how the use of PHO, without regard to the "0g Trans Fat" label, could
 19 be unfair if it was lawful. *See AdvancePierre*, 733 F. App'x at 907 (finding, without
 20 discussion, that "Hawkins cannot satisfy the 'unfair' prong of the UCL under either of the
 21 two tests used by California courts."). To find otherwise would create potential liability
 22 under the unfair prong of the UCL for defendants that truthfully disclose legal but
 23

24 ³ At the pleading stage, this court found the "issue of whether a practice is deceptive or
 25 unfair is generally a question for the trier of fact." (Doc. No. 40 at 9 (quoting *Puentes v.*
 26 *Wells Fargo Home Mort.*, 160 Cal. App. 4th 638, 645 n.5 (2008)).) This court also found
 27 a business practice is unfair if it is substantially injurious to consumers and the harm to
 28 consumers outweighs the utility to the defendant. (*Id.* (citing *Rubio v. Capital One Bank*,
 613 F.3d 1195, 1205 (9th Cir. 2010)).) Accordingly, the court declined to dismiss
 Plaintiff's use claim under the unfairness prong. (*Id.*)

1 unhealthy ingredients, including those the FDA specifically declines to prohibit for a period
2 of years.

3 On the other hand, the degree of harm presented by PHO is a material and genuinely
4 disputed fact.⁴ Also, the FDA did not decide as a matter of law that use of PHO was
5 “unfair” under the UCL, only that there was no longer a consensus that PHOs are generally
6 recognized as safe. Accordingly, despite the legality of the use of trans fat during the class
7 period, reasonable jurors could disagree as to whether the danger of trans fat to human
8 health was sufficient to render its use “immoral, unethical, oppressive, unscrupulous or
9 substantially injurious to consumers,” *see S. Bay*, 72 Cal. App. 4th at 886-87, and Kroger
10 cites no controlling authority suggesting otherwise. Accordingly, Kroger’s motion for
11 summary judgment on Plaintiff’s use claim under the unfairness prong of the UCL (Count
12 I) is **DENIED**.

13 **B. Labeling Claims Under the UCL, FAL, and CLRA**

14 **1. Kroger’s Motion**

15 As noted above, there is no genuine dispute the breadcrumbs were labeled “0g Trans
16 Fat,” but contained some trans fat. Kroger nonetheless argues it is entitled to summary
17 judgment on all of Plaintiff’s “mislabeling” claims. Kroger argues that a reasonable
18 consumer would understand the breadcrumbs contained trans fat because the ingredient list
19 included PHO. (Doc. No. 275 at 25.) Although there is no dispute the ingredient list
20 included PHO, Kroger’s argument has been rejected in multiple cases that Kroger fails to
21 acknowledge in its motion.

22 In *Williams v. Gerber Prod. Co.*, 552 F.3d 934, 939 (9th Cir. 2008), the Ninth Circuit
23 held that reasonable consumers should not “be expected to look beyond misleading
24

25
26 ⁴ Kroger makes boilerplate objections to nearly all, if not all, of the scientific evidence upon
27 which Plaintiff relies to show the dangers of trans fat to human health. (Doc. Nos. 296,
28 310.) Because no part of this court’s order depends on the findings in those specific
materials, the objections are **OVERRULED AS MOOT**. The court will, of course, address
Kroger’s objections upon consideration of Kroger’s motions in limine.

1 representations on the front of the box to discover the truth from the ingredient list in small
 2 print on the side of the box.” The court stated, “[w]e do not think that the FDA requires an
 3 ingredient list so that manufacturers can mislead consumers and then rely on the ingredient
 4 list to correct those misinterpretations and provide a shield for liability for the deception.”
 5 *Id.*; see also *Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1117, 1129 (C.D. Cal. 2010)
 6 (“*Williams* stands for the proposition that where product packaging contains an affirmative
 7 misrepresentation, the manufacturer cannot rely on the small-print nutritional label to
 8 contradict and cure that misrepresentation.”). Additionally, in *Reid v. Johnson & Johnson*,
 9 780 F.3d 952, 959 (9th Cir. 2015), the Ninth Circuit found that regardless of the holding in
 10 *Williams*, “it is far from clear that typical consumers understand that a product containing
 11 [PHO] necessarily has trans fat, so even if an ingredient list has a curative effect in some
 12 cases, it might not here.”

13 Finally, in *Beasley v. Lucky Stores, Inc.*, Case No. 18-cv-07144-MMC, 2020 WL
 14 3128873, at *3 (N.D. Cal. June 12, 2020), which involved a product labeled “0g Trans Fat”
 15 that listed PHO as an ingredient, the court declined to dismiss UCL claims on summary
 16 judgment, even where the plaintiff admitted he knew that PHO contained trans fat while
 17 he was buying the product. The court stated, “even given [the plaintiff’s] knowledge about
 18 the relationship between PHO and trans fat a triable issue of fact exists as to whether
 19 [the plaintiff], faced with multiple clear statements about the absence of trans fat [on the
 20 label], should have investigated the ingredient list [for PHO].” *Id.*

21 Kroger makes several other arguments against Plaintiff’s labeling claims, none of
 22 which are availing. First, Kroger argues Plaintiff admitted “she knew or should have
 23 known beginning in 2005 that, despite the breadcrumbs’ ‘0g Trans Fat’ label, the
 24 breadcrumbs contained trans fat because the ingredients listed PHO.” (Doc. No. 275 at
 25 25.) Kroger already made this argument in opposition to class certification, and the court
 26 rejected it based on a detailed analysis of Plaintiff’s testimony in the record. (Doc. No.
 27 263 at 26-31.) The court also noted that Kroger appeared to have failed to develop
 28 Plaintiff’s testimony on this issue. (*Id.* at 26.) Kroger does not argue the court overlooked

1 evidence or testimony, and makes no attempt to distinguish the argument it is making now
2 from its previously rejected argument, or to explain why the outcome should be different
3 on summary judgment.

4 Second, Kroger argues Plaintiff has “no evidence whatsoever” to support her
5 “sweeping” interpretation of the “0g Trans Fat” label. (Doc. No. 275 at 25-26.) Of course,
6 the label itself, combined with Kroger’s admission that the breadcrumbs contained some
7 trans fat, is “actual evidence” and not “no evidence whatsoever.” *See Williams*, 552 F.3d
8 at 938 (“It is true that ‘the primary evidence in a false advertising case is the advertising
9 itself.’”) (citation omitted). And no reasonable juror could find that interpreting “0g Trans
10 Fat” to mean “no” trans fat is unreasonably “sweeping.”

11 Third, Kroger argues reasonable consumer expectations can only be determined by
12 surveys or expert evidence. (Doc. No. 275 at 26-27.) The cases Kroger cites do not support
13 this argument. In *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1026 (9th Cir. 2008),
14 the Ninth Circuit held that “[s]urveys and expert testimony regarding consumer
15 assumptions and expectations may be offered but are not required[.]” Also, in *Victor v.*
16 *R.C. Bigelow, Inc.*, No. 13-CV-02976-WHO, 2016 WL 4502528, at *4 (N.D. Cal. Aug. 29,
17 2016), *aff’d*, 708 F. App’x 333 (9th Cir. 2017), the court faulted the plaintiff for not
18 providing extrinsic evidence, such as consumer survey evidence, to support his claim that
19 the words “delivers healthful antioxidants” would lead a reasonable consumer to believe
20 the product contains a “healthy dose” of antioxidants. Here, it is not clear what else the
21 claim “0g Trans Fat” would lead a reasonable consumer to believe other than the product
22 contains no trans fat. It is certainly not so clear as to decide this issue in favor of Kroger
23 as a matter of law. *See Hawkins v. Kroger Co.*, 906 F.3d 763, 771 (9th Cir. 2018) (“We
24 held [in *Reid*] that ‘No Trans Fat’ was misleading because a reasonable consumer might
25 infer that the product did not contain trans fat.”).

26 Fourth, Kroger argues, in passing, that the FDA “mandate[s] and allow[s] that
27 products labeled ‘0g’ trans fat may still contain trace levels of trans fat.” (Doc. No. 275 at
28

25 (citing 21 C.F.R. § 101.9(c)(ii)).⁵ As the Ninth Circuit and this court have repeatedly explained, although the FDA mandates the disclosure of “0g Trans Fat” *on the nutrition label* when the product contains less than 0.5 grams of trans fat, it does not mandate or allow for the product to be labeled “0g Trans Fat” elsewhere on the package. (Doc. No. 40 at 6 (citing *Kroger*, 906 F.3d at 770-71; *Reid*, 780 F.3d at 960; 21 CFR §101.13(c)); *see also id.* at 7-8 (“Under the regulations, Kroger is free to continue to add PHO to its products until June 18, 2020. What Kroger cannot do, outside the nutrition label, is to represent that the product contains ‘0g Trans Fat’ when the product is alleged to contain PHO.”).⁶ For the above reasons, Kroger’s motion for summary judgment on Plaintiff’s labeling claims under the UCL, FAL, and CLRA (Counts IV-VIII) is **DENIED**.

2. Plaintiff’s Motion

a. Predicate Violation

Plaintiff moves for summary judgment on her labeling claim under the unlawful prong of the UCL. (Doc. No. 286 at 19.) The unlawful prong of the UCL prohibits “anything that can properly be called a business practice and that at the same time is forbidden by law.” *Cel-Tech*, 20 Cal. 4th 163 at 180 (quotation marks and citations omitted). “Violation of almost any federal, state, or local law may serve as the basis for a UCL claim.” *Plascencia v. Lending 1st Mortg.*, 259 F.R.D. 437, 448 (N.D. Cal. 2009) (citation omitted). Plaintiff argues the “0g Trans Fat” label violated 21 C.F.R. §§ 101.13 and § 101.62. (Doc. No. 286 at 10, 13, 20.) Under 21 C.F.R. § 101.62(a)(1)-(2), “[a] claim about the level of fat . . . in a food may only be made on the label . . . if . . . (1) [t]he

⁵ Kroger’s citation to 21 C.F.R. § 101.9(c)(ii) appears to be in error. The correct citation is likely 21 C.F.R. § 101.9(c)(2)(ii).

⁶ Kroger argues the court should disregard Dr. Wong’s opinion that the label was misleading in favor of its own expert. (Doc. No. 275 at 27.) As noted above, Dr. Wong’s opinion is not determinative of any of part this court’s order. At this stage, therefore, the court declines to exclude Dr. Wong’s testimony or weigh it against Kroger’s expert’s testimony.

claim uses one of the terms defined in this section [or] (2) [t]he claim is made in accordance with the general requirements for nutrient content claims in § 101.13.” Section 101.13 provides “the label or labeling of a product may contain a statement about the amount or percentage of a nutrient if . . . [t]he statement does not in any way implicitly characterize the level of the nutrient in the food and it is not false or misleading in any respect (e.g., ‘100 calories’ or ‘5 grams of fat’)[.]”⁷ 21 C.F.R. § 101.13(i)(3).

In *Reid*, the Ninth Circuit held that § 101.13(i)(3) does not “authorize” a “No Trans Fat” claim on the label of a food product, and therefore the plaintiff’s UCL claims based on the “No Trans Fat” label were not preempted by federal law. 780 F.3d at 963. The court reasoned (1) “[a] nutrient content claim *fails* [under §101.13(i)(3)] if it is “false or misleading in any respect” and (2) “[b]ecause [the product] contain[ed] some trans fat (between 0 and 0.5 grams per serving), its ‘No Trans Fat’ claim [was] misleading in at least one respect.” *Id.* at 962 (emphasis added). The Ninth Circuit rejected the district court’s finding that the “No Trans Fat” label was not misleading. *Id.* at 963.

In this case, the Ninth Circuit interpreted *Reid* to hold (1) “the statement ‘No Trans Fat’ was *not allowed* outside of the Nutrition Facts Panel since the product did contain trans fat,” and (2) “under the regulations, [the ‘No Trans Fat’ claim] could *only* be made if it did ‘not in any way implicitly characterize the level of the nutrient in the food and [was] not false or misleading in any respect.’” *Hawkins*, 906 F.3d at 770 (emphasis added). Like in *Reid*, the *Hawkins* court held that Plaintiff’s labeling claims under the UCL were not preempted because the “0g Trans Fat” label was not “authorized” by FDA regulations. *Id.* at 772.

Kroger argues *Reid* and *Kroger* did not hold the “No Trans Fat” and “0g Trans Fat” labels were unlawful under FDA regulations. (Doc. No. 295 at 27-28.) Rather, Kroger

⁷ Plaintiff also claims the label violated 21 U.S.C. §§ 342 and 348 and CAL. HEALTH & SAFETY CODE § 110545, but Plaintiff provides no argument with respect to those statutes in her request for summary judgment as to Plaintiff’s labeling claims under the unlawful prong of the UCL.

1 argues *Reid* and *Kroger* merely held the labels were not preempted by FDA regulations
 2 because the labels were not “expressly authorized.” (*Id.*) Kroger does not dispute,
 3 however, that false and misleading labels concerning fats are prohibited under 21 C.F.R.
 4 §§ 101.62(a)(2) and 101.13(i)(3), and Kroger cites no case supporting its implied argument
 5 that it was lawful to falsely or misleadingly label its breadcrumbs as containing “0g Trans
 6 Fat.”⁸ Instead, Kroger argues that Plaintiff fails to meet her burden because she fails to
 7 provide any actual evidence that there is no genuine dispute the “0g Trans Fat” label was
 8 false or misleading.⁹ (Doc. No. 295 at 29.)

9 As noted above, the nutrition label itself, which lists PHO as an ingredient, is actual
 10 evidence the “0g Trans Fat” label was false or misleading. Plus, Kroger does not dispute
 11 the breadcrumbs contain some trans fat. Furthermore, *Reid* and *Kroger* clearly hinge on
 12 the courts’ findings that “No Trans Fat” or “0g Trans Fat” labels are false or misleading if
 13 the products contain “some” trans fat. *See Hawkins*, 906 F.3d at 771 (describing the “0g
 14 Trans Fat” label as “false[.]”); *Reid*, 780 F.3d at 962 (“No Trans Fat” is “misleading in at
 15 least one respect”). Although *Reid* and *Hawkins* involve decisions made at the pleading
 16 stage regarding preemption, at this stage, the material facts are the same and are not
 17 genuinely disputed. Even if *Reid* and *Kroger* are not directly controlling on the issue, they
 18 are certainly persuasive towards finding as a matter of law that the “0g Trans Fat” label
 19

20 ⁸ Kroger also does not dispute that its “0g Trans Fat” label was “[a] claim about the level
 21 of fat” under 21 C.F.R. §§ 101.62(a).

22 ⁹ Kroger also argues that Plaintiff cannot meet her burden of showing the “0g Trans Fat”
 23 label is false or misleading because: (1) the FDA requires that trace amounts of trans fat
 24 under 0.5 gram be listed as “0g” on the nutrition panel; (2) the ingredients included PHO;
 25 (3) Plaintiff admitted she knew that PHO contained trans fat; (4) FDA regulations allow
 26 claims such as “fat free” and “no fat” where trace amounts less than 0.5 grams are included
 27 in the food; (4) Plaintiff relies on the unreliable testimony of Dr. Wong regarding
 28 reasonable consumer perceptions; and (5) Plaintiff provides no survey of consumer
 perceptions to support her claim. (Doc. No. 295 at 29-30.) All these arguments have been
 previously made and rejected by this court and others, or are rejected elsewhere in this
 order.

violated 21 C.F.R. §§ 101.62(a)(2) and 101.13(i)(3). *See Hawkins*, 906 F.3d at 770 (the “No Trans Fat” claim in *Reid* was “not allowed” and “could only be made” if it was not false or misleading); *Reid*, 780 F.3d at 963 (the label “fails” under the regulations). Additionally, as noted above, 21 C.F.R. § 101.62(a)(1)-(2) provides that claims about the level of fat may “only” be made on the label if (1) the claim uses one of the terms defined in the regulations, and (2) the claim is not false or misleading. Here, the claim “0g Trans Fat” is not defined in the regulations, and there is no genuine dispute the breadcrumbs contain some trans fat. Accordingly, Plaintiff’s motion for summary judgment that the “0g Trans Fat” label violated 21 C.F.R. §§ 101.62(a)(1)-(2) and 101.13(i)(3) is **GRANTED** as to that particular issue.

b. Entire Claim

Plaintiff also argues she is entitled to summary judgment on her entire unlawful UCL labeling claim because “[a] claim under the UCL’s unlawful prong has just one element: the violation of any predicate law or regulation.” (Doc. No. 286 at 19.) In support of this argument, Plaintiff cites *Bruton v. Gerber Prods. Co.*, 703 Fed. App’x 468, 471-72 (9th Cir. 2017), in which the court held “[t]he best reading of California precedent is that the reasonable consumer test is a requirement under the UCL’s unlawful prong only when it is an element of the predicate violation.” Plaintiff also cites two district court cases following *Bruton*. *See Hadley v. Kellogg Sales Co.*, Case No. 16-CV-04955-LHK, 2019 WL 3804661, at *23 (N.D. Cal. Aug. 13, 2019); *Silver v. BA Sports Nutrition, LLC*, Case No. 20-cv-00633-SI, 2020 WL 2992873, at *4 (N.D. Cal. June 4, 2020).

Plaintiff may be correct that the reasonable consumer test does not apply to her claim under the unlawful prong of the UCL because the reasonable consumer test is not an element of a violation of 21 C.F.R. §§ 101.62(a)(2) or 101.13(i)(3). The relevant element of a violation of 21 C.F.R. § 101.13(i)(3) is that the label is “false or misleading in any respect.” In contrast, the reasonable consumer test is whether members of the public are likely to be deceived. *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016) (citations omitted).

1 The inapplicability of the reasonable consumer test does not, however, necessarily
 2 lead to the conclusion that no other elements currently exist for unlawful UCL claims.
 3 Courts have recognized other elements to an unlawful UCL claim, including a “business
 4 practice,” *Cel-Tech*, 20 Cal. 4th 163 at 180, as well as economic injury and a causal
 5 connection or reliance, *see Beaver v. Tarsadia Hotels*, 29 F. Supp. 3d 1294, 1312 (S.D.
 6 Cal. 2014) (citations omitted), *aff’d*, 816 F.3d 1170 (9th Cir. 2016). In its opposition to
 7 Kroger’s motion, Plaintiff provides some argument that reliance is not an element.¹⁰ (Doc.
 8 No. 287 at 12-13.) Plaintiff does not, however, attempt to show that all these previously
 9 recognized elements are inapplicable by virtue of the inapplicability of the reasonable
 10 consumer test or for some other reason.¹¹ Moreover, as discussed below, a genuine dispute
 11 of material fact exists as to reliance/causation. Accordingly, Plaintiff’s motion for
 12 summary judgment on her entire labeling claim under the unlawful prong of the UCL
 13 (Count IV) is **DENIED**.

14 C. Warranty Claims

15 Kroger argues it is entitled to summary judgment on Plaintiff’s express and implied
 16 warranty claims (Counts III and IX). (Doc. No. 275 at 27-28.) There is an implied
 17 warranty that goods sold by a merchant are fit for the ordinary purposes for which those
 18 goods are sold. CAL. COM. CODE § 2314(2)(c). But “there is no implied warranty with
 19 regard to defects which an examination ought in the circumstances to have revealed to [the
 20 buyer].” *Id.* § 2316(3)(b). Kroger argues that no implied warranty exists because the

21
 22 ¹⁰ The cases cited by Plaintiff regarding the reliance element relate to statutory standing,
 23 and did not find the plaintiffs were entitled to summary judgment on an unlawful UCL
 24 claim simply by showing a predicate legal violation. *See, e.g., Cappello v. Walmart Inc.*,
 25 394 F. Supp. 3d 1015, 1020 (N.D. Cal. 2019).

26 ¹¹ In *In re Lumber Liquidators*, MDL No. 1:15-md-2627 (AJT/TRJ), 2017 WL 2646286,
 27 at *15 (E.D. Va. June 20, 2017), which Plaintiff cites, the court did not find the plaintiff
 28 was entitled to summary judgment based solely on a predicate violation. Rather, the court
 denied summary judgment to the defendant because the evidence was sufficient to
 reasonably show a predicate violation. *Id.*

1 ingredient label disclosed PHO, which is the same basis on which other courts have
2 dismissed similar claims. (Doc. No. 275 at 28.) In opposition, Plaintiff argues the presence
3 of PHO rendered the breadcrumbs unfit for consumption. (Doc. No. 287 at 28.) In support
4 of this argument, Plaintiff cites (1) a 2005 study by the U.S. Institute of Medicine, (2) Dr.
5 Wong's testimony, and (3) the FDA's June 17, 2015 determination regarding PHOs. (*Id.*)

6 Here, Kroger is correct that at least two district courts have dismissed implied
7 warranty claims under similar circumstances. *See Walker v. B&G Foods, Inc.*, No. 15-CV-
8 03772-JST, 2019 WL 3934941, at *3 (N.D. Cal. Aug. 20, 2019); *Biscomerica*, 2017 WL
9 1133406, at *5. The courts found that the products at issue were not unfit for human
10 consumption given that the FDA's June 17, 2015 determination that PHO would *not* be
11 considered unsafe or adulterated under federal law until June 18, 2018. *Id.* However, as
12 noted above with respect to Plaintiff's unfair use claim under the UCL, the degree of harm
13 presented by PHO is a material and genuinely disputed fact. Also, the FDA did not decide
14 as a matter of law that the presence of PHO in breadcrumbs renders them unfit for their
15 ordinary purpose, or does so as it relates to the implied warranty of merchantability.
16 Reasonable jurors could disagree about the ordinary purpose of Kroger breadcrumbs, or
17 even the purpose of the consumption of food in general. Accordingly, despite the FDA's
18 regulations, a trier of fact could find the presence of PHO rendered the breadcrumbs unfit
19 for human consumption. Kroger cites no controlling authority suggesting otherwise.

20 Kroger's other arguments are unavailing. As discussed above, listing PHO as an
21 ingredient does not necessarily prove that Plaintiff, or any buyer, ought to have known that
22 PHO contains trans fat, or the degree to which the amount of PHO in the breadcrumbs was
23 unhealthy. Also, Kroger does not dispute that Plaintiff provided notice of the alleged defect
24 in the breadcrumbs within a reasonable time after discovering it, and Kroger cites no
25 authority supporting its suggestion that Plaintiff was required to specifically mention a
26 breach of warranty in order to give sufficient notice. Finally, although Kroger moves for
27 summary judgment on both Plaintiff's implied and express warranty claims, Kroger
28 provides no argument as to why Plaintiff's express warranty claim fails. Accordingly,

Kroger's motion for summary judgment on Plaintiff's implied and express warranty claims (Counts III and IV) is **DENIED**.

D. Reliance/Causation

Kroger argues it is entitled to summary judgment because Plaintiff admits she did not rely on the "0g Trans Fat" label, and therefore, the label did not cause her to buy the breadcrumbs or otherwise factor into her decision to purchase them. (Doc. No. 275 at 29-31.) Specifically, Kroger argues that Plaintiff admits (1) she did not "behave differently" after the "0 Trans Fat" label appeared, and (2) the label "simply did not matter." (Doc. No. 275 at 29-30.) Kroger argues a lack of reliance demonstrates a lack of statutory standing to bring any of her claims.¹² (*Id.* at 28.)

This is virtually the same argument Kroger made in opposition to class certification. (*See* Doc. No. 227 at 8.) In previously rejecting it, the court agreed that Plaintiff is susceptible to the defense that she did not rely on the "0g Trans Fat" label in her decision to purchase, or to continue purchasing, Kroger breadcrumbs after 2008 when the "0g Trans Fat" label first appeared. (Doc. No. 263 at 21.) The court disagreed, however, with Kroger's contention that Plaintiff admitted she did not rely on the "0g Trans Fat" label. (*Id.*) The court stated, "[t]o the contrary, Plaintiff clearly and repeatedly states, under oath, that she relied on the '0g Trans Fat' label on Kroger's breadcrumbs in her decision to purchase them." (*Id.*)

Kroger makes no attempt to distinguish the argument it is making now from the argument it previously made, and Kroger does not address the court's rejection of that argument. Accordingly, as the court previously found, "[a]lthough Plaintiff's testimony regarding her reliance on the '0g Trans Fat' label may not be entirely consistent, she did *not* admit that she did *not* rely on the '0g Trans Fat' label." (*Id.* at 22.) For example,

¹² *See Guttman v. La Tapatia Tortilleria, Inc.*, Case No. 15-cv-02042-SI, 2015 WL 7283024, at *4 n.2 (N.D. Cal. Nov. 18, 2015) ("Causes of action for breach of express warranty and breach of implied warranty of merchantability do not appear to require proof of reliance as a separate element.")

1 Plaintiff testified during her deposition that she stopped purchasing Kroger breadcrumbs
 2 “as soon as [she] found that the zero trans fat statement wasn’t accurate.” (Doc. No. 104-
 3 1 at 41:3-6.) To the extent Plaintiff made admissions and gave inconsistent testimony,
 4 these weaknesses are not so great as to justify finding that no genuine dispute of material
 5 fact exists as to reliance or causation, which Kroger claims are essential elements to all of
 6 Plaintiff’s claims.¹³ Whether Plaintiff admitted she did not rely on the “0g Trans Fat” label,
 7 and the impact of such a finding on her credibility and the elements of her claims, are issues
 8 more appropriately resolved at trial.

9 Kroger further argues that under “long settled” law, “evidence that the plaintiff made
 10 the same purchasing decision irrespective of the challenged representation defeats a
 11 showing of injury.” (Doc. No. 275 at 31.) The cases cited by Kroger to support this
 12 argument, however, are not controlling or persuasive. In *Clark v. Hershey Co.*, No. 18-cv-
 13 06113 WHA, 2019 WL 6050763, at *2 (N.D. Cal. Nov. 15, 2019), the court granted
 14 summary judgment for Hershey in a case alleging that chocolate candies were misleadingly
 15 labeled as containing “no artificial flavors” when in fact they contained artificial malic
 16 acid. The court found the named plaintiffs’ injuries were not caused by the “no artificial
 17 flavors” label because (1) the plaintiffs admitted they interpreted the label to mean no
 18 artificial *ingredients*, and (2) the plaintiffs claimed to have relied on the label before it even
 19 appeared on the packaging. *Id.* at *2. Here, Plaintiff does not admit she misunderstood
 20 the meaning of “0g Trans Fat,” and Plaintiff does not claim to have relied on the label
 21 before it appeared.

22 Additionally, in *Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 793 (9th Cir.
 23 2012), the court upheld the dismissal of the plaintiffs’ UCL claims because the plaintiffs
 24 did not allege they purchased cigarettes based on the fraudulent statement they could still
 25 redeem their rewards points. Here, Plaintiff testified, though perhaps inconsistently, that
 26

27
 28 ¹³ As noted above, Plaintiff argues that reliance is not an element of Plaintiff’s claims under
 the UCL’s unlawful prong. (Doc. No. 287 at 13.)

1 she relied on the “0g Trans Fat” label in her decision to purchase the breadcrumbs.
 2 Therefore, neither *Clark* nor *Sateriale* suggests, as Kroger does, that Plaintiff’s admitted
 3 decision to purchase the breadcrumbs before and after the “0g Trans Fat” label appeared
 4 warrants a finding, as a matter of law, that the label played no part in her decision to
 5 purchase the breadcrumbs.¹⁴ For the above reasons, Kroger’s motion for summary
 6 judgment based on lack of reliance or causation is **DENIED**.

7 **E. Statutes of Limitations**

8 Plaintiff claims to have first discovered that the breadcrumbs contained trans fat in
 9 August 2015. (Compl. ¶¶ 74, 111; *see also* Doc. No. 263 at 26 (discussing the discovery).)
 10 She filed the instant suit in October of 2015. Kroger nonetheless argues the three and four
 11 year statute of limitations periods¹⁵ expired because Plaintiff admits that in or around 2005,
 12 and not later than 2009, she: (1) learned from her doctor and television commercials about
 13 “red flags” from PHO and trans fat; (2) was specifically informed that PHO contained trans
 14 fat; and (3) was warned to look at the nutrition label and ingredients. (Doc. No. 275 at 32.)

15 Again, this argument is virtually identical to the previously rejected argument
 16 Kroger made in opposition to class certification. (Doc. No. 263 at 26-31.) This court
 17 agreed that “Plaintiff made some statements regarding the degree to which she knew or
 18 should have known that, if she wanted to avoid trans fat, she should have read the
 19 ingredients of processed foods to see if they contained PHO.” (*Id.* at 31.) The court
 20 disagreed, however, that Plaintiff admitted “she knew or should have known beginning in
 21

22
 23 ¹⁴ In *Clark*, the district court noted the plaintiffs cited multiple decisions in which courts
 24 found that reliance could have still occurred even though the plaintiff purchased the product
 25 before and after the alleged mislabeling occurred. *See* 2019 WL 6050763, at *3 (citing
 26 *Lanovaz v. Twinings N. Am., Inc.*, No. C-12-02646-RMW, 2014 WL 46822 (N.D. Cal. Jan.
 6, 2014)).

27 ¹⁵ The parties do not dispute, and this court previously found, the statute of limitations
 28 period is three years for Plaintiff’s FAL and CLRA claims, and four years for her UCL and
 breach of warranty claims. (*See* Doc. No. 263 at 26 n.17.)

2005 that, despite the breadcrumbs’ ‘0g Trans Fat’ label, the breadcrumbs contained trans fat because the ingredients listed PHO.”¹⁶ (*Id.*) Again, Kroger makes no attempt to distinguish the argument it is making now from the argument it previously made, and Kroger does not address the court’s reasons for rejecting that argument.¹⁷

Moreover, as discussed above, courts have repeatedly found that reasonable consumers do not have a duty to look beyond the front of the box. *See Williams*, 552 F.3d at 939; *Andriesian v. Cosmetic Derm., Inc.*, No. 3:14-cv-01600-ST, 2015 WL 1638729, at *5 (D. Or. Mar. 3, 2015) (“Following *Williams*, numerous district courts in the Ninth Circuit have rejected similar arguments that a consumer who cares about the ingredients must read the ingredient list.”). Courts have also repeatedly found that reasonable consumers do not necessarily understand that PHO contains trans fat. *See Reid*, 780 F.3d at 959; *Beasley*, 2020 WL 3128873, at *3. Accordingly, courts have repeatedly rejected the same argument Kroger makes here. *See, e.g., Silva*, 2020 WL 6051605, at *1 (claims not time-barred because “[i]t is not dispositive that PHO was listed as an ingredient on the product packaging”). For the above reasons, Kroger’s motion for summary judgment based on a statute of limitations defense is **DENIED**.

F. Affirmative Defenses

Plaintiff also moves for summary judgment on some of Kroger’s affirmative defenses. (Doc. No. 286 at 20-31.)

1. Statutory Standing

Plaintiff argues that lack of standing is not an affirmative defense and that Plaintiff bears the burden of proving standing. (*Id.* at 21-22.) Kroger, however, describes its

¹⁶ The court also noted that Kroger appeared to have failed to develop Plaintiff’s testimony on this issue. (Doc. No. 263 at 26.)

¹⁷ Kroger also does not meaningfully address Plaintiff’s argument that Kroger’s statute of limitations argument has no bearing on her unlawful UCL claims because Plaintiff’s knowledge that PHO contains trans fat would not put her on inquiry notice that Kroger violated FDA regulations concerning adulterated foods and trans fat. (Doc. No. 287 at 17.)

1 reliance argument as one of statutory standing. (Doc. No. 295 at 31.) As discussed above,
 2 at least one genuine dispute of material fact exists as to reliance and causation, which
 3 Kroger claims are essential elements to all of Plaintiff's claims. Accordingly, Plaintiff's
 4 motion for summary judgment as to Kroger's statutory standing defense is **DENIED**.

5 **2. Failure to State a Claim, Primary Jurisdiction, Economic** 6 **Loss Doctrine, and Third Party Liability**

7 Kroger does not dispute that failure to state a claim, the economic loss doctrine, and
 8 third party liability are not affirmative defenses. Kroger also does not dispute that its
 9 primary jurisdiction defense has already been struck. Accordingly, Plaintiff's motion for
 10 summary judgment as to these defenses is **GRANTED**.

11 **3. Preemption**

12 Plaintiff argues that Kroger's preemption defense fails as a matter of law because it
 13 has already been rejected by this court and the Ninth Circuit. (Doc. No. 286 at 22.) Kroger
 14 does not dispute that preemption fails as an affirmative defense as to Plaintiff's labeling
 15 claims, but argues it survives as to Plaintiff's use claims. (Doc. No. 295 at 31.)
 16 Accordingly, Plaintiff's motion for summary judgment on Kroger's preemption defense is
 17 **GRANTED** as to Plaintiff's labeling claims, and is **DENIED AS MOOT** as to Plaintiff's
 18 use claim under the unlawful prong of the UCL because, as discussed above, that claim is
 19 dismissed. To the extent that a preemption defense is still available to Kroger with respect
 20 to Plaintiff's use claim under the unfair prong of the UCL, Plaintiff's motion for summary
 21 judgment is **DENIED**.

22 **4. Puffery**

23 Plaintiff argues that Kroger's puffery defense fails because (1) "0g Trans Fat" is a
 24 specific statement of fact, not a generalized statement, and (2) the Ninth Circuit has already
 25 held that "0g Trans Fat" is false and misleading. (Doc. No. 286 at 23.) Kroger does not
 26 dispute that puffery must be generalized or vague. (Doc. No. 295 at 32.) The court agrees
 27 the "0g Trans Fat" label is too specific to be puffery. *See Southland Sod Farms v. Stover*
 28 *Seed Co.*, 108 F.3d 1134, 1145 (9th Cir. 1997) ("50% Less Mowing" is not puffery).

1 Accordingly, Plaintiff's motion for summary judgment as to Kroger's puffery defense is
2 **GRANTED.**

3 **5. Latches**

4 Plaintiff argues that latches fails as an affirmative defense because Kroger presents
5 no evidence that Plaintiff unreasonably delayed bringing suit, and there is no evidence
6 Kroger was prejudiced by the loss of evidence. (Doc. No. 286 at 26.) As discussed above,
7 a genuine dispute of fact exists as to when Plaintiff knew or should have known of the basis
8 for her claim. Kroger also cites Plaintiff's lack of memory as lost evidence that prejudiced
9 Kroger. (Doc. No. 295 at 33.) Accordingly, Plaintiff's motion for summary judgment as
10 to the affirmative defense of latches is **DENIED.**

11 **6. Unclean Hands, Waiver, Consent, Release, and Estoppel**


12 Finally, Plaintiff argues that Kroger fails to show: (1) unclean hands, because there
13 is no evidence Plaintiff engaged in misconduct; (2) waiver, because there is no evidence
14 she intentionally relinquished her right; (3) consent, because there is no evidence she
15 agreed to Kroger's conduct; (4) release, because there is no evidence of mutual intent; and
16 (5) estoppel, because there is no evidence of Kroger's detrimental reliance. (Doc. No. 286
17 at 28-31.) Kroger argues each of these defenses survives because it offered evidence that
18 Plaintiff knew or should have known the breadcrumbs contained trans fat while she was
19 buying them, and that Plaintiff has brought other similar lawsuits. (Doc. No. 295 at 33.)
20 Although some, if not all, of these defenses may be thin, there is a genuine dispute of fact
21 as to when Plaintiff knew or should have known of the basis for her claims. Additionally,
22 notwithstanding the benefit of fact development through discovery, Kroger should not be
23 denied the opportunity to assert these defenses before being given the opportunity to
24 develop the trial record. Accordingly, Plaintiff's motion for summary judgment as to the
25 defenses of unclean hands, waiver, consent, release, and estoppel is **DENIED.** Plaintiff is
26 invited, however, to move for judgment as a matter of law at the close of evidence as to
27 these and any other remaining defenses.
28

1 **IV. CONCLUSION**

2 For the forgoing reasons, the parties' cross motions for summary judgment (Doc.
3 Nos. 275, 277, 286) are **DENIED IN PART** and **GRANTED IN PART**. Kroger's motion
4 as to Plaintiff's use claim under the unfair prong of the UCL (Count I) is **DENIED**.
5 Kroger's motion as to Plaintiff's use claim under the unlawful prong of the UCL (Count
6 II) is **GRANTED**. Plaintiff's motion as to her use claim under the unlawful prong of the
7 UCL (Count II) is **DENIED**. Kroger's motion as to Plaintiff's labeling claims under the
8 UCL, FAL, and CLRA (Counts IV-VIII) is **DENIED**. Kroger's motion as to Plaintiff's
9 implied and express warranty claims (Counts III and IX) is **DENIED**. Kroger's motion as
10 to reliance/causation and the statute of limitation is also **DENIED**. Plaintiff's motion for
11 summary judgement as to Kroger's affirmative defenses is **DENIED IN PART** and
12 **GRANTED IN PART** as consistent with the above discussion.¹⁸

13 IT IS SO ORDERED.

14 DATED: January 11, 2021

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16 JEFFREY T. MILLER
17 United States District Judge
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28 ¹⁸ Kroger's previously filed motion for summary judgment (Doc. Nos. 183-84) is DENIED
AS MOOT.